[2021] JMSC Civ. 78

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015 HCV 01607

BETWEEN	**SHARON MOTT** (**Administrator Estate Kishauna Ann-Marie Clarke, Deceased, intestate**)	**CLAIMANT**
AND	**UNIVERSITY OF TECHNOLOGY JAMAICA**	**1ST DEFENDANT**
AND	**DR. WINSTON ISLES**	**2ND DEFENDANT**
AND	**LITTLE TOKYO RESTAURANT CO. LTD**	**3RD DEFENDANT**

IN CHAMBERS

Mr. Matthew Royal instructed by Messrs. Myers Fletcher and Gordon for the Applicant/1st defendant.

Miss Andrea Lanaman instructed by Marion Rose-Green and Company for the Respondent/claimant.

Miss Kathryn Williams instructed by Messrs. Livingston Alexander and Levy for the 3rd defendant.

Heard on April 7, 2021 and May 7, 2021

Inactivity and delay in prosecuting claim; Dismissal for want of prosecution and abuse of process

CORAM: PUSEY, J. J

INTRODUCTION:

[1] By Notice of Application for Court Orders (NAFCO) filed on June 26, 2019 the 1st defendant seeks the following orders:

1. Summary Judgement for the 1st defendant against the claimant.

2. Alternatively, the claimant's statement of case is struck out as against the 1st defendant for want of prosecution.
3. Further, in the alternative, the claimant's statement of case is struck out as against the 1st defendant as an abuse of process.
4. Cost to the 1st defendant.

The 2nd defendant did not appear or participate in this application. However, the 3rd defendant was served with Notice and joined with the 1st defendant in this application.

BACKGROUND

[2] On March 21, 2009 Kishauna Ann-Marie Clarke ingested a meal at the Little Tokyo Restaurant in Liguanea, Saint Andrew operated by the 3rd defendant and soon fell ill. She was a student of the University of Technology, Jamaica (UTECH) and authorized to utilize medical facilities in that institution. She visited the Medical Centre at UTECH where she was treated by Dr. Winston Isles and given medication. Subsequently her body became stiff and she was admitted to the University Hospital of the West Indies where she died on March 23, 2009.

[3] Letters of Administration in the estate of the deceased were granted in the Supreme Court on April 12, 2013 to her Administrator Miss Sharon Mott, who filed this claim in the Supreme Court on the March 13, 2015 seeking damages under the Fatal Accident Act and the Law Reform (Miscellaneous Provisions) Act. It is the journey of this matter through the Supreme Court that has given rise to this Application.

CHRONOLOGY

[4] The chronology of events relevant to the application is as follows:

- A grant of Administration in the estate of Kishauna Ann-Marie Clarke, deceased was obtained on April 12, 2013.
- The Claim Form was filed March 13, 2015.
- Acknowledgement of Service on behalf of the 1st defendant was filed on May 27, 2015.

- 1st defendant filed its defence June 30, 2015.
- 3rd defendant filed its defence June 3, 2015.
- Mediation was set for April 26, 2016.
- 1st defendant served its Statement of Facts and Issues for Mediation on April 15, 2016.
- By letter dated April 28, 2016 the claimant's attorney advised that the Mediation was postponed as the assigned Mediator was ill.
- On June 26, 2019 the 1st defendant filed this application seeking summary judgement and to strike out the claim for want of prosecution, which was served on the claimant on the January 1, 2019. The hearing of the application was set for April 27, 2020.
- On September 22, 2020 the Affidavit of Sara-Lee Scott was filed by the claimant in response to the application.

CONCESSIONS

[5] This Application seeks to have the claim under the Fatal Accident Act struck out as being filed out of time. Section 4(2) of the Act states;

> *Any such action shall be commenced within three years after the death of the deceased person or within such longer period as a court may, if satisfied that the interests of justice so require, allow.*

The claim was filed almost six years after the death of the deceased and so is barred pursuant to the statute. No application has been made for an extension of time within which to file the claim pursuant to The Fatal Accident Act, as permitted by the statute.

[6] The claimant conceded that that claim is statute barred although she argued that the application could be made for extension of time. Unfortunately, that not having been done, that limb of the claim cannot be pursued.

[7] The applicant conceded that the claim pursuant to the Law Reform (Miscellaneous Provisions) Act was properly filed within the limitation period of six years allowed by The Limitations of Actions Act.

[8] Consequently, the order seeking summary judgement was abandoned and submissions were limited to the application to strike out the claim under the Law Reform (Miscellaneous Provisions) Act for want of prosecution and alternatively as an abuse of the processes of the court.

APPLICANT'S SUBMISSION

[9] The applicant submits that the claim ought to be dismissed for want of prosecution as the claimant has failed to take any steps for approximately four and half years since the mediation exercise was thwarted by the illness of the Mediator, to prosecute this matter. In the alternative counsel urged that the claim should be dismissed as an abuse of the processes of the court as delay can amount to abuse of process.

[10] He relied on the decision of the Court of Appeal in **Sandals Royal Management Limited v Mahoe Bay Company Limited** [2019] JMCA App 12 in which the House of Lords decision in **Grovit v Doctors et al** [1997] 1 ALL ER 417 was affirmed and adopted as enunciating the principles applicable in determining dismissal for want of prosecution and abuse of the process of the court.

[11] The applicant argues that the circumstances of this case fall within the four corners of these principles; as the incident that gave rise to this matter happened over ten years ago, the claim was filed within days of the limitation period running out and the matter has been in abeyance for over four years since it was referred for mediation. This, counsel argued, evidences the lethargy with which the claimant has acted and no explanation has been forthcoming for the inordinate delay. The supporting affidavit to the Notice of Lisa-Mae Gordon deposed that the "1st defendant would be prejudiced if it was forced to defend a claim which has lapsed into abeyance due to the inaction of the claimant, so many years after the event occurred."

[12] Counsel further argued that if the court were to find that there is no prejudice to the 1st defendant in the circumstances of this case, the absence of prejudice was not harmful to the application as in **Kieth Hudson et al v Vernon Smith et al** Supreme Court Civil Appeal No. 35 of 2005, the Court of Appeal ruled that a court is justified in striking out a claim even when the defendant is not prejudiced by the delay. Prolonged inactivity could amount to abuse of process.

[13] The court in the **Govit** case, dismissed it for a two-year delay in prosecuting an appeal, so the period of delay in the matter at Bar is sufficiently long for the court to act on it.

[14] The applicant also argued that courts exist to enable disputes to be resolved. So where a party files a suit and shows no intention to conclude the litigation, the matter should be dismissed as an abuse of process at the instance of the other party.

THE CLAIMANT/RESPONDENT'S SUBMISSION

[15] The claimant argued that there is no abuse of the processes of the court in the conduct of this matter by the claimant. There has been delay due to oversight on the part of the claimant's attorneys in taking steps to have the mediation conducted after it was thwarted. Counsel argued that the defendants under Part 74 the Civil Procedure Code 2002 (the CPR), as done by the defendants in **Ballantyne, Beswick and Company (A Firm) v Jamaica Public Service Co Ltd** [2016] JMSC Civ 13, were within their right to take steps to have the mediation conducted. It is not the sole purview of the claimant to take steps regarding mediation.

[16] Relying on CPR 26.3 and several cases decided on that rule, including the **Ballantyne, Beswick and Co.** case, the claimant further argued that the step of striking out a case is draconian and should be avoided if '*other curative measure'* in the CPR can be employed to remedy the situation and advance the claim in a timely manner. The applicant retorted that in **Sandals Royal Management Limited v Mahoe Bay Company Limited** Foster-Pusey JA decided that the

principles governing applications pursuant to CPR 26.3 are not applicable to an application to strike out for want of prosecution occasioned by protracted inaction.

[17] Further, counsel argued that the claimant has a meritorious claim and should not be deprived of the opportunity of a fair determination of the matter.

[18] On the issue of prejudice to the defendants, counsel argued that the applicant has not set out any factors evidencing any prejudice to them. In addition, the claim is substantially based on the medical records of the deceased, which are preserved by law and is not reliant on the memory of witnesses. It is the claimant who would suffer great prejudice if the claim was dismissed.

ISSUE

[19] The issue for determination is whether the claim should be dismissed for want of prosecution or as an abuse of the processes of the court as a result of the manifest delay in prosecuting this matter.

ANALYSIS AND CONCLUSION

[20] The most recent decision of the Jamaican Court of Appeal on the principles applicable in determining the issues arising in this Application, is the decision, *Per* Foster-Pusey JA, in **Sandals Royal Management Limited v Mahoe Bay Company Limited** (supra)**.** The principles, which are well settled, were enunciated by Lord Woolf in the House of Lords decision in **Grovit v Doctors et al** (supra) reciting the statement of the law by Lord Diplock in **Birkett v James** [1978] AC 279, 318F-G in the following terms.

> *"The power should be exercised only where the court is satisfied either*

(1) That the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or

(2) (a) That there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and

(b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party."

[21] It is clear therefore that inordinate and inexcusable delay which results in prejudice to the defendant and is such that it could render the trial unfair are critical factors in this application

[22] After the scheduled mediation was postponed, none of the parties to this claim took any steps to advance the matter. CPR 74.6(3) suggests that a defendant can act to advance the mediation process if the claimant does not comply with CPR 74.6(2) at the initial stage of the process of mediation:

"*74.6 (2) Not later than 28 days after a referral to mediation, the claimant party shall, on form M2,*

a) where agreement has been reached between the parties, notify the mediation referral agency and all other claimants and defendants who have filed defences but against whom judgment has not been entered, of the name(s) of the mediator(s) selected and the proposed date of the mediation; or

b) *where no agreement has been reached, apply to the mediation referral agency for the appointment of a mediator and the scheduling of the mediation*

(3) Where the claimant does not take the appropriate action under rule 2 within the time indicated, a defendant must do so within 7 days of the expiration of the period provided in rule 2."

[23] However, in this matter all the steps necessary to have the mediation conducted were taken by the claimant. Unfortunately, the mediator, at very short notice, was unable to conduct the mediation scheduled for April 26, 2016. CPR 74 is silent as to what is to obtain in circumstances such as these. Notwithstanding, there is nothing that precluded either party from contacting the mediation agency, as the default was that of the agency, to have the mediation conducted.

[24] Both parties sat back, according to the claimant due to oversight, and the matter went into abeyance until this Notice was filed June 26, 2019 by the 1st defendant and concurred in by the 3rd defendant. It is important to mention that it is the claimant's claim and she should be energized to have it resolved.

[25] Counsel for the claimant has admitted that due to oversight no action was taken in the matter from 2016. The applicant's posture is that it was the duty of the claimant to take steps to have the mediation conducted.

[26] Counsel for the claimant has admitted that due to oversight no action was taken in the matter from 2016. The applicant's posture is that it was the duty of the claimant to take steps to have the mediation conducted.

[27] In the **Sandals Royal Management** case the Court of Appeal dismissed the appeal as the appellant had failed to take steps to prosecute the appeal for 11 years after judgement had been entered against it. In coming to that conclusion the court analysed the effect on the matter occasioned by the delay. It found that the respondent would be unable to locate some of its witnesses or would do so at great expense, which would be in addition to the protracted expense it was incurring to maintain the matter in the court. It also found that a judgement had

been entered in favour of the respondent and so they would be prejudiced if this judgement, which subsisted for 12 years, was to be overturned. In those circumstances the delay was inordinate and there was prejudice to the respondent, so the application was granted.

[28] In the matter at Bar there is admitted delay. The applicant has, however, not disclosed any factors that remotely suggest any prejudice that it would occasion as a result of the delay, when it filed its Notice on June 2019. Neither has it been shown that the trial would be rendered unfair because of issues regarding witnesses and evidence. The affidavit of Lisa-Mae Gordon in paragraph (8) simply says;

> The 1st defendant would be prejudiced if it was forced to defend a claim which is brought outside the limitation period, **and lapsed into abeyance due to inaction.** ***Emphasis mine.***

[29] The 3rd defendant did not file an affidavit in the matter, although it was served with the application by order of the court, but submitted orally that it *could* be unable to locate its witnesses and the witnesses *may not* be able to recall what transpired from 2009. Nothing factual was therefore forthcoming.

[30] The applicant argued, correctly, that in the **Sandals Royal Management** case the court ruled that the absence of prejudice was not a bar to the granting of an application of this nature. But the delay must have some effect on the claim. The second limb of Lord Diplock's recitation of the principles to be applied suggests that the delay must have some impact on the fairness of the trial or prejudice the defendant vis-a-vis the claimant or others.

[31] What therefore is the effect of not having the mediation conducted since April 26, 2016?

[32] The starting date is April 26, 2016 when the mediation failed and ends when this Notice was filed on June 26, 2019 – a period of three years and two months. At

this stage of the progress of the case the pleadings were closed and relevant instructions would have been obtained from litigants. The Claim was filed in 2013 and the event giving rise to the claim occurred in 2009, ten years before this application was filed.

[33] The question then is, is this three year and two-month period of inaction, in the circumstances of this case so inordinately lengthy that it results in prejudice to the defendants and militates against a fair trial of the claim, necessitating justice to be best served by dismissing the claim for want of prosecution? I am aware that the Court of Appeal in the case **Gerville Williams and others v The Commissioner of the Independent Commission of Investigations and the Attorney General of Jamaica** [2014] JMCA App 7, dismissed an appeal for want of prosecution after less than two years of inaction at the appellate level. There was an application for extension of time to file skeleton arguments and the record of the trial by the respondents. These were important initial steps in the progress of the appeal. If granted the matter would revert to the state it had been in and cause even more delay, so the application was dismissed. In the matter at Bar it has not been established by evidence that the refusal of the application would occasion any further delay, as that envisaged in the **Gerville Williams** matter.

[34] In the matter at Bar there is no evidence that supports a contention that the delay is so egregious that it would eradicate any semblance of fairness. There is nothing that suggests that memories will erode, evidence will be lost or destroyed or any prejudice will be occasioned by this admitted delay. Neither is there any evidence that the claimant has demonstrated no intention to proceed with the matter, as was the case in the **Grovit** matter itself. Each case must stand on its own facts.

[35] In such circumstances the granting of the application to dismiss for want of prosecution will secure to the applicant the dismissal of the claim in their favour for no substantial reason. The statement of Lord Diplock that delay itself can amount to abuse of process and can result in dismissal for want of prosecution, must be

based on the facts and circumstances of a particular case and the impact of the delay on the claim. Neither is this inconsistent with the observations of Cook JA in **Alcan Jamaica Company v Herbert Johnson and Idel Thompson Clarke** (Unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No. 20/2003, where he said:

> *"Delay is inimical to there being a fair trial. Inordinate and inexcusable delays undermine the administration of justice. Even moreso public confidence will tend to be eroded."*

[36] These are general statements and the learned Judge of Appeal analyzed the circumstances of the appeal before him, filed in 1996 for an incident which occurred in 1993, where inaction resulted in an application to dismiss for want of prosecution being filed in 2002. He granted the application in those circumstances.

[37] This has been the approach in all the cases I have read. The principles of Lord Diplock are applied to the circumstances and an assessment is made of the effect on the claim and an outcome arrived at. Mere delay without accompanying deleterious consequences could not, to my mind, result in the dismissal of a claim. None of the cases reveal that. There is always some impact on witnesses, expenses, fairness of the trial or some prejudice to the defendant in all the cases. In the case at Bar, based on the evidence, it has no impact whatsoever.

[38] So in the circumstances of the matter in question where no deleterious or any effect at all on the claim is revealed in the evidence, I see no good reason to dismiss the claim for want of prosecution, although the inaction is to be highly frowned on and not encouraged. The fact that the attorney for the 3rd defendant made oral submissions that it may be difficult to locate witnesses, is not evidence on which the court can act.

[39] Regarding the submissions of the claimant where counsel utilized the principles that govern an application to strike out a statement of case pursuant to CPR 26.3(1) in an application such as this, that issue has been put beyond debate by

Foster-Pusey JA in the **Sandals Royal Management Limited** case; the principles are not applicable.

[40] In the circumstances of this claim, I would therefore refuse the urging of the applicant to dismiss this claim for want of prosecution and make the following Orders to advance the matter to trial, utilizing the case management powers of the CPR.

ORDER

The following Orders are made:

1. The orders sought in paragraphs 2 – 3 of the Notice of Application for Court Orders filed on June 26, 2019 are refused.
2. The parties to proceed to Mediation within 120 days of the date hereof.
3. Unless the claimant takes steps to have the mediation scheduled within 14 days of the date hereof, her statement of case stand stuck out without further need for the court's intervention.
4. Summary judgement in respect of the claim under the Fatal Accidents Act is granted with cost to the 1st and 3rd defendants to be agreed and if not, taxed.
5. Summary judgement in respect of the claim under the Law Reform (Miscellaneous Provisions) Act is refused.
6. Cost to the 1st defendant on the Notice to be agreed and if not, taxed.
7. The applicant to prepare, file and serve this Order